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In The
Supreme Court of the United States

DERRICK HILLMAN AND DALLAS HILLMAN,
Petitioners,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Ohio Court of Appeals for the Ninth Judicial District

PETITIONERS' REPLY BRIEF

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RESPONSE ARGUMENTS

I

Assuming the "investigative stop" of a motorist can be justified on the basis of information supplied by an informant, where after a full and complete search of the vehicle (including the use of a drug dog) is completed more than an hour later, any further detention of the people involved require probable cause to arrest?

II

Assuming a consent to search is given, such consent to search can be revoked at anytime prior to the commencement of the search itself?

PETITIONERS' REPLY BRIEF

Here the facts are clear. A point here was reached when the petitioners were forcibly taken from the street scene where the police had searched them and their vehicle for contraband. This occurred in the wake of an investigative vehicle stop. The lawfulness of this stop and the ensuing searches are not under challenge. Indeed, it is conceded that they (*i.e.*, the Hillman brothers) originally consented to the searches that occurred following the traffic stop. On the other hand, one of the issues in the failed Appeal, which ruling is also being challenged here, is that the detention that occurred in the wake thereof was rendered illegal because of the inordinate extension of the time involved. Concededly this issue was resolved against Petitioners.

In any event, the issue that dominates here centralizes the cogent fact that the Court credited proof that showed once the Hillman brothers were transported to the police station for the purpose of a strip search, they made it emphatically clear they were not consenting to any such search. Indeed, as put by the Court: having once given their consent they could not be heard to complain that this extended their detention. (**Opinion, Appendix "B," ¶23**[1]).

Here, of course, it is an indisputable fact that the State bears the burden of proving any consent it relies on was freely and voluntarily given. Simply put, the facts to be considered are easily put. It starts with the idea that if these officers had probable cause to arrest, there would have been no need for the State to contend, as it does, these officers had their consent. So postured several dispositive facts are clear enough. First off, there is no dispute any consent these officers had before the officers conducted their search and located the contraband and this was seasonably repudiated, *i.e.*, it was withdrawn. With this being so the alleged consent the State contends they had occurred could only have occurred after some considerable prompting. Perforce, it was characterized by either, repeated requests, coercion or the like. Also, included would be the fact that before that happened they were placed in custody.

Clearly, as the Court recognized was the case, once they were delivered to the station ". . . the Hillman's initially reversed course and stated they would not

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[1] The Appendix references herein are to the Appendices to the Petition for Writ.

consent to a strip search" (**Id., ¶24**). This staunch position they were credited with punctuating with the thought, not only, that "they would not consent to a strip search," but as the Court further noted it was also said, "they would fight the officers" (**id., ¶8**) if they tried to force them.

Thus, it is significant here that not only did the State fail to offer any proof as to why the brothers capitulated, what is even more compelling is the fact, that the Court of Appeals would regard any prior consent as having been cast in stone, and as such was impervious, to being revoked. Indeed, if it were otherwise, then one has to wonder if this Court can live with the following quote from the Opinion:

> {**¶29**} Viewing the totality of the circumstances in the present matter, this Court finds that the trial court did not err in finding that "the Hillmans' continued detention did not result in their being placed in custody. A review of the record shows that Derrick was no indication that there was a significant delay between he initial search of the vehicle and the drug dog sniff. The drug dog sniff of the vehicle indicated the presence of drugs in the vehicle. When no drugs were found in the vehicle after a second search, a strip search was appropriate. The strip search could not be performed at the location of the traffic stop, so it was necessary to transport the Hillmans to the Justice Center, and the Hillmans voluntarily went to the Justice Center. Furthermore, although initially the Hillmans said they would not consent to the strip search, they later consented. Therefore, their argument that the police should have

> obtained a search warrant before performing the strip search is without merit. In light of their consent, no search warrant was needed. During the strip searches, crack cocaine was found on the persons of both Dallas and Derrick Hillman. At that point, they were placed under arrest.
>
> {¶30} Given the above, **this Court cannot conclude that the trial court erred in finding that the Hillmans were not in custody until after the strip searches were performed**.

(Opinion. Appendix "B," at ¶12a-13a.) (Emphasis supplied.)

Clearly then, if the Hillmans were not in custody, then given their adamantly expressed unwillingness to be strip-searched, it follows no basis existed for detaining them - - even momentarily. With this being so, and despite this expressed refusal, they were nonetheless searched. The facts then show it inexorably follows the resultant circumstances surely amounted to at least a submission to a show of official authority of some type. And, if they consented, this force was sufficient to persuade them to believe that unless they did so, they would be placed in some sort of jeopardy.

In any event, the issue that dominates here centralizes the cogent fact that the Court literally credited proof that showed once the brothers were transported to the police station for the purpose of a strip search they made it clear they were not consenting to any such search. Indeed, as put by the

Court that having once given their consent "they should not be heard to complain. . . ." (**Id., ¶23**).

I

EVEN ASSUMING AN INVESTIGATIVE STOP CAN BE JUSTIFIED ON THE BASIS OF INFORMATION SUPPLIED BY AN ALLEGED TO BE RELIABLE INFORMANT, AFTER THE OFFICERS HAD CONCLUDED (AS PUT BY TRIAL COURT): "THE STREET PART OF THE INVESTIGATION," ABSENT PROBABLE CAUSE ANY FURTHER DETENTION OF THESE PARTIES CAN NOT BE JUSTIFIED IN THE ABSENCE OF PROBABLE CAUSE - - TO ARREST OR TO SEARCH.

Given that arguably all contact between citizens and the police, especially on a public street, are inherently coercive, and given there were at least seven (7) law enforcement officers, with four (4) vehicles at this stop (**tr., pp. 7, 8, 18, 19, 37,** and **41**), which must be coupled with the fact that it was for more than an hour that these brothers were detained, in restraints, there on the street (which seated separately in a police car). Thus, who can say what effect all this had on them. With all this being so, to believe these individuals consented to this treatment can be likened to believing in the tooth fairy.

With this being so, the fact that no one can even divine (from the clashing positions taken by the prosecutor before the trial Court, *and* the contrary positions taken by the trial Court and the reviewing

Court) an acceptable legal basis for the denial of the Motion to Suppress is disturbingly clear. This follows because clearly anyone given a lengthy sentence, the case here, should have the satisfaction of knowing the Courts involved in determining their fate were not only aware of the controlling constitutional tenets involved in their case, but that they were aptly and informatively applied to their case.

Having said that, one thing seems most clear here. It is the fact that the police lacked probable cause to extend the detention once the searches made there on the street had been concluded. With this fact as a given, even if we suppose as the Court of Appeals proclaimed, Petitioners consented to being transported to the station to be stripped searched (**Appendix "B," at ¶¶7 and 8**), the fact remains, we must still deal with a certain reality. Clearly there is nothing in the Opinions rendered by Court's below that holds, or even suggests, the people were under arrest, or for that matter probable cause to arrest then existed. With this being so, then clearly their statement that they were not going to consent to being stripped and searched created a fact-specific issue that not only must be reckoned with, but is really dispositive.

This follows because it is axiomatically absent a valid arrest no right to search the persons of our Petitioners existed. And, the fact is the trial Court's finding was that no arrest occurred here "until the strip searches were performed" (**Appendix "C," at ¶13a**). Also, the fact that the Record shows the police were fully advised they would resist being searched. This fact as well, makes it manifest that this was as clear an indication as possible that any curtailment of their liberty from that point cannot be squared with

principles that distill from ***Mendenhall v. United States*, 446 U.S. 544 (1980).**

Here, as well, the facts are clear. A point here was reached when the petitioners were forcibly taken from the street where the police had searched them and their vehicle for contraband. This occurred in the wake of an investigative vehicle stop. The lawfulness of this stop and the ensuring searches are not under challenge. Indeed, it is conceded that the Hillman brothers (our Petitioners) originally consented to the searches that occurred following the traffic stop. Indeed, the position this is so has not even been challenged. On the other hand, one of the issues in the failed Appeal, which ruling is to be surely also being challenged here, is that the extended detention that occurred in the wake thereof was rendered illegal. And, this because of the inordinate extension of the time involved. Concededly this issue was likewise resolved against Petitioners. The Court's stated reasons why this is so is, of course, flawed and indefensible. (**Appendix "B," ¶21**).

In any event, the issue that dominates here centralizes the cogent fact that the Court credited proof that showed once the brothers were transported to the police station for the purpose of a strip search they made it clear they were not consenting to any such search. Indeed, as put by the Court that having given once given that they could not be heard to complain (**Id., ¶23.**)

II

ONCE ANY CONSENT TO SEARCH SUPPOSEDLY GIVEN IS REVOKED, ANY CAPITULATION WITH REFERENCE TO SUCH REVOCATION MUST BE ESTABLISHED BY UNEQUIVOCAL, INDEED SPECIFIC, PROOF THAT CONSENT WAS NOT ONLY FREELY GIVEN BUT WAS UNCONTAMINATED BY ANY COERCION OR DURESS.

In our view, in resolving this issue, the Courts below, and the prosecutor, failed to reckon with several critical facts. These are all the more important because of the finding that these Petitioners were not in custody, although they were being restrained. Our point here, which we deem critical, is that clearly they have failed to reckon, in their ratiocinations, with the fact that the Courts are obligated to indulge in a presumption against the waiver of constitutional rights.

In this regard, see ***United States v. Recalde*, 761 F.2d 1448, at 1453 (10th Cir. 1985)**. There the Court noted it was insignificant that "**Recalde** voluntarily accompanied the officers into" a particular location (**id., at 1455**), where the search occurred. As the Court saw it whether the alleged consent was voluntary must be determined under the totality of the circumstances and, it should be noted, not unlike what occurred here, the Court in **Recalde**, likewise "made no specific finding except that [he] had consented to the search at the station" (**id., p.1453, n. 4**).

Indeed, the State does not even attempt to show what evidence the Courts could be relying on for the conclusion that despite rescinding the prior consent, supposedly that had been given, they later changed their minds. . . [and] later agreed to be strip-searched (**Brief in Opposition, p. 6**). The significance of this finding, albeit flawed, lies I the fact that it is a concession that no probable cause existed to arrest or search. This follows because given the intrusive of the forceful detentions of the Brothers at this point (**opinion, Appendix "B" ¶23 to ¶30.**)

In the other hand, what was said by the Tenth Circuit in **Recalde** is especially apt. here. There the Court recognized in that case that there was a point where " the consensual aspects of the encounter had evaporated and this detention had exceeded the bounds of an investigative stop" (**Id., 761 F 2d, at 1456**). Because this is so, it renders ridiculous the Appeals Court's summary conclusion that the Brothers consented. Stated another way, as that court must be putting it, the Hillman brothers consented and their finding this was so is really the onbly finding required. The fact that no basis for this conclusion was set forth shows the Court regarded this gross omission as being irrelevant.

CONCLUSION

The bottom line here and we so contend, is that on this record there was no rational basis for the Trial Court to deny the Suppress Motion. And there was even less of a basis for the action taken by the Court of Appeals. While all that is bad enough, the positions taken by counsel for the State is ever worse. Indeed, rather than argue which of these courts counsel felt

got it right. Rather, this is wrong. We are being told none of these issues raised deserve this Court's attention. Clearly, what the court of Appeals also did wrong, and so did counsel – opposite, is that they focused only on the alleged consent aspect of this scenario. Both, totally ignored the significance of the lack of probable cause, to, either seize or arrest. See ***Dunaway v. New York*, 442 U.S. 200, at 216 – 217 (1979); and *Brown v. Illinois*, 422 U.S. 590, at 603 (1975)**. Also see ***U.S. v. Mendenhall*, 446 U.S. 544 (1980)**. Simply put, the Court's preoccupation with consent, which it summarily resolved, blinded it, to a basis reality. The facts are clear. Once the Hillmans, who were not under arrest (as these courts put it, they were free to leave – or should have been. Why that is not so is something that is beyond pontification. And, that is all we have from the State and the Courts. Clearly they believe it is enough that this is a drug case so what is the problem with this result?

Respectfully submitted,

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